Support State Decisions in the Coal Ash Rule

With the July 17, 2018 amendments to the Coal Ash Rule, EPA took a step to provide regulatory flexibility by having EPA make certain determinations when EPA is the permitting authority. This action greatly supplements the flexibility associated with States that have EPA approved coal ash programs – given there is only one State with an approved program. Still, the Agency missed an opportunity to create a simpler and more effective process by allowing States without an EPA approved coal ash program to make the various determinations. Consistent with comments provided on the proposed rule, the following outlines points that EPA should consider.

EPA Rationale – In the final amendments EPA explains the critical reason why certain flexibility was not exercised in the original rule:

> In the absence of a state oversight mechanism to ensure that alternative standards would be appropriate, EPA concluded at that time it could not adopt many of the "more flexible" performance standards in part 258 that commenters requested. Id at 21,333.

To the extent EPA does not have sufficient trust associated with industry hiring board certified experts to make certain determinations, others may disagree, but the above EPA reasoning fits. It is noted that in the original rule, EPA did allow professional engineers to make certain certifications, however, the additional flexibility in question does involve more substantial declarations. The EPA rationale, however, does not at all fit the situation where EPA could have allowed the State, without an EPA approved coal ash program, to provide the certification. Underlying the EPA rationale is whether the entity enabling the flexibility has the technical ability and trust to "ensure that alternative standards would be appropriate".

Technical Ability of States – The Agency has created a divide between States with and without EPA approved coal ash programs. From a technical ability perspective, the divide lacks support. First of all, take the situation of the State of Oklahoma, the only EPA approved coal ash program. Oklahoma, will be allowed to execute flexibility provided in the new amendments – which were issued after its program was approved. There was no evaluation of the State's technical abilities to "ensure alternative standards would be appropriate". As for whether States really have such technical abilities, there are several reasons to strongly conclude that the do. The added flexibility in the amendments mirrors that provided to municipal solid waste landfills. States have been approved to make those calls, and have done so for decades without significant issues. In addition, there is EPA's Comprehensive State Ground Water Protection Program and Well Head Protection Program in which EPA has extensively engaged States. In an April 4, 1997 EPA memorandum from Timothy Fields, Jr., Acting Assistant Administrator, Office of Solid Waste and Emergency Response, the Agency affirmed the role of CSGWPP in EPA Remediation Programs:

> "EPA's ground-water remediation programs – Superfund, RCRA Subtitle C and D, and Underground Storage Tanks – have an important stake in the CSGWPP process...To the extent authorized by EPA statute and consistent with Agency program implementation objectives, EPA will defer to State policies, priorities, and standards once a State has developed an "adequate program."

States have the technical ability, the expertise well rooted in established EPA programs, and is not in any observable way enhanced by EPA approval of a state coal ash program. Given the overall structure of States having the prime role in groundwater protection standards within the state, it should be recognized that level of expertise for an appropriate State groundwater protection standard is far more suited to a State decision – which governs groundwater criteria for everything in the state.

Trusting States – With States making equivalent calls for municipal solid waste landfills, and decisions under EPA's Comprehensive State Ground Water Protection and Well Head Protection programs, there is no basis to believe EPA's regulatory partners can not be trusted when making similar decisions for coal ash. The coal ash program approval does not anoint States with trust in these areas or confirm associated technical abilities. The EPA coal ash program approval has meaning in certain areas, but there is no reason the type of paperwork should limit State calls on the flexibility addressed in the amendment. A State could "ensure that alternative standards would be appropriate", in a State permit that is associated with an EPA approved coal ash program, or for States without an EPA approved coal ash program do so equally as well in several other formats.

Requested Action – With tight deadlines and a massive number of comments, the Agency was certainly faced with difficult challenges. In the upcoming second round of amendments, EPA should propose allowing States without EPA approved coal ash programs to use their expertise under other established EPA programs to execute flexibility provided in the recent amendments. The States have the demonstrated technical ability and should be trusted. Allowing for broader State involvement will relieve an EPA burden, take advantage of the already extensive engagement States have with these facilities and with establishing environmental criteria for the State, and expedite decision making. If such action is not possible, I petition the Agency to address the regulatory issue in a subsequent rule, or provide an explanation as to how states without an EPA approved coal ash program lack the skills to "ensure that alternative standards would be appropriate", or why they can not be trusted without an approved coal ash program.

Ancillary Comment – Functionally, EPA's setting criteria at background levels for constituents without an MCL, has structural problems. Background concentrations inherently are devoid of a relationship to environmental risks, and thus the need for some meaningful form of regulatory flexibility. The basic types of regulations are risk-based or technology-based. Background concentrations are essentially the structure for requiring how the pollution control technology performs, not a risk-based solution. It is best applied to new structures that are designed to meet the standard. Holding an old waste management unit to background criteria simply opens up issues that cannot be rationalized from an environmental risk perspective. Because the rule applied background criteria to existing waste management units, the need for rational and effective risk-based flexibility is substantial from an economic and environmental perspective.